SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 812

CHRISTIAN CORPORATION,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, AND THE CITY OF RICHMOND,

Respondents.

PETITIONER'S BRIEF TO ACCOMPANY PETITION FOR A WRIT OF CERTIORARI.

This is an application for a writ of certiorari to review the action of the Supreme Court of Appeals of Virginia, the court of last resort of that State, in refusing petitioner a writ of error to a judgment of the Circuit Court of the City of Richmond, holding that petitioner was subject to license taxes by the Commonwealth of Virginia and by the City of Richmond for the privilege of engaging in interstate commerce.

A Brief Statement of Facts.

The facts have already been fully summarized in the petition for a writ of certiorari (pp. 2-4). The record there referred to shows that petitioner is a sales agent or drum-

mer engaged in interstate commerce, and that the Commonwealth of Virginia and the City of Richmond have imposed upon it fixed sum and percentage license taxes for the privilege of engaging in interstate commerce. Petitioner has an office in Richmond, Virginia. It represents principals whose places of manufacture are outside of the boundaries of the Commonwealth of Virginia. It takes orders for goods which its principals manufacture or sell. At the time the orders are taken the goods are outside of the Commonwealth of Virginia. The orders are forwarded by petitioner to its principals in other States. The orders are accepted or rejected by the principals and if the orders are accepted, the goods are shipped in interstate commerce from outside of Virginia to the purchasers in Virginia, and petitioner is paid a commission for having obtained the orders (R. 17-21).

The Virginia Statute and the Richmond City Ordinance under which the license taxes complained of were imposed.

The Virginia Statute under which petitioner was assessed with license taxes is Section 174 of the Tax Code of Virginia, found in the Appendix to the Virginia Code of 1936 (Michie) and reads as follows:

> "Commission merchants and brokers.—Every person, firm or corporation, doing business in this State who receives or distributes provisions and merchandise, including flour, hay or grain, shipped to such person, firm or corporation for distribution on account of the shipper, or who participates in the profits, ensuing from or accruing out of the sales of such provisions or merchandise, including flour, hay or grain, or who invoices such sales or collects the money therefor, shall be deemed to be a broker who receives or distributes provisions and merchandise, including flour hay, or grain.

"Every person, firm or corporation, buying or selling for another any kind of merchandise, on commission, except associations or organizations of farmers, including produce exchanges, organized and maintained by farmers for mutual help in the marketing of their produce and not for profit, shall be a commission merchant. Any person, firm or corporation licensed as a commission merchant may sell any personal property which may be left with, or consigned to him for sale, except gold or silver coin, bonds, certificates of public or private debts or other securities; provided, however, that any such merchant may sell gold or silver coin, certificates of public or private debts or other securities, by taking out the license therefor prescribed in the case of stock brokers.

"Every person, firm or corporation shall pay for the privilege of transacting the business of a commission merchant or broker the sum of fifty dollars, provided the commissions for the preceding year did not exceed one thousand dollars, but when the commissions exceeded one thousand dollars the tax shall be fifty dollars, and an additional tax at the rate of one dollar for each hundred dollars or fraction thereof, of commissions in excess of one thousand dollars, and if the license is to include the privilege of selling gold or silver coins, bonds, certificates of public or private debts, or other securities, there shall be paid, in addition, the amounts required in each case to be paid by stock brokers and in like manner.

"The license tax on every commission merchant or broker beginning business shall be the flat tax above prescribed, plus a tax in accordance with the foregoing scale measured by the commissions which it is estimated he will receive from the time he commences business to the following December thirty-first. (Tax Bill, secs. 48, 49; 1914, p. 487; 1915, p. 232; 1922, p. 109.)"

The Richmond city ordinance under which the license tax was imposed is Section 22 of Chapter 10 of the Rich-

mond City Code of 1937 (as amended, and reads as follows:

> "AGENTS—Sales Agents or Agencies.—Persons, firms or corporations engaged in business as sales agents or agencies * * * $50.00 and one-half of one percentum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. (December 15, 1933.)"

Prior to 1941 the Supreme Court of Appeals of Virginia held in *Adkins* v. *City of Richmond*, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583, 81 A. S. R. 702 (1900) and *Castner* v. *Commonwealth*, 138 Va. 81, 121 S. E. 894 (1924) that neither the Commonwealth nor the City of Richmond could lawfully impose any license tax for the privilege of engaging in interstate commerce. These decisions were strictly in accordance with an unbroken line of decisions by this Court hereinafter referred to. During the year 1940 the administrative officials of the Commonweatlh of Virginia and of the City of Richmond concluded that the Commonwealth and the City had the lawful right to impose license taxes for the privilege of engaging in interstate commerce, and thereupon proceeded to overrule the aforesaid decisions of the Supreme Court of Appeals of Virginia and of this Court. About the same time the administrative officials of the City of Norfolk reached a similar conclusion and took similar action.

In *Dunston* v. *The City of Norfolk*, 177 Va. 689 (1941) the Supreme Court of Appeals of Virginia by a divided Court held that the administrative officials of the City of Norfolk had properly overruled the previous decisions of the Supreme Court of Appeals of Virginia and of this Court and held that interstate commerce was no longer protected by the Commerce Clause of the Constitution of the United

States. The Chief Justice and one of the Associate Justices filed a vigorous dissenting opinion in 177 Va. 701-709. The Supreme Court of Appeals of Virginia thereafter refused petitioner a writ of error in the cases at bar the effect of which was to affirm the judgment of the Circuit Court of the City of Richmond holding that persons engaged in interstate commerce were now subject to license taxation by the Commonwealth of Virginia and the City of Richmond for the privilege of engaging in such commerce.

Assignments of Error.

Petitioner assigns as error the action of the trial court and of the Supreme Court of Appeals of Virginia in holding that it is subject to license taxation by the Commonwealth of Virginia and the City of Richmond for the privilege of engaging in interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the decisions of this Court holding that States and municipalities are without authority to impose license taxes upon persons engaged in interstate commerce for the privilege of engaging in such commerce.

The Law of the Case.

The direct question here involved has been settled by the decision of this Court in *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. Ed. 785, 22 Sup. Ct. 576 (1902). This case is directly in point and adjudicates the issue in the case at bar. It has never been overruled. It has been frequently cited with approval by this Court, the last time in the majority opinion in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 Sup. Ct. 388, 397 note 11 (1940).

In *Stockard* v. *Morgan, supra*, complainants, residents of the State of Tennessee were engaged as agents and brokers for the sale of property of nonresident principals. The case

was submitted to the Court on the following agreed statement of facts, 185 U. S. 28-30, 46 L. Ed. 787-89:

" 'The complainant, as the representative of nonresident parties, firms or corporations, solicits orders for goods from jobbers or wholesale dealers in Chattanooga, Tennessee, and when such orders are obtained sends them to his nonresident principal or principals. If an order is accepted the goods are shipped by such nonresident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale the goods in all instances belong to the nonresident principal or principals, and are shipped to the state of Tennessee from another state.

" 'In making sales or soliciting orders for the goods the complainant sometimes exhibits samples to the local jobber or wholesale dealer, and sometimes takes the orders without showing a sample.

" 'Unless complainant has been previously authorized by the principal or principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such nonresident principal or principals, who own the goods.

" 'At the end of each month, or at stated periods, the complainant is paid a commission by such nonresident principal or principals for goods previously sold on accepted orders. No commission is paid on orders taken but rejected. Complainant does not receive for his services any pay or salary from any local jobber or dealer or resident of Tennessee, nor does he assume to represent or represent or hold himself out as representing, any resident of Tennessee, or negotiate any sales of goods for residents of Tennessee. His principals are all residents of other states of the United States, and the goods sold are shipped from such other state to the state of Tennessee for delivery to buyers who reside in Tennessee.

" 'The complainant has an office or 'headquarters' in Chattanooga, Tennessee, where he keeps samples, stationery, and other articles; but he travels around on

foot daily or frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms, or corporations, all nonresidents of Tennessee and residents of other states in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee.

" 'The defendants and solicitors for the state of Tennessee and Hamilton County contend that, under the facts, the complainants are 'merchandise brokers,' and each of them is bound for privilege taxes under the laws of Tennessee.

" 'That J. H. McReynolds should pay a privilege tax for 1900 to the state of $20, and to the county of $20.

" 'That Stockard & Jones should pay to the state $20 for each of the years 1897, 1898, 1899 and 1900, and a like sum for each of said years to the county of Hamilton.

" 'That each of the other complainants owe the same sums as Stockard & Jones.

" 'That all of the complainants should be held for proper penalties, costs, and attorneys' fees if they are held liable for such taxes.

" 'The complainants contend that they are engaged exclusively in interstate commerce, and are not bound for such privilege taxes; further, that the revenue laws of Tennessee applicable *to 'merchandise brokers' do not include these complainants, so as to make them subject to privilege taxes, but even if such laws do include complainants, yet they are inoperative and void as against complainants, who are engaged solely in interstate commerce.' "

In holding the complainant's business not subject to tax, the Supreme Court said, 185 U. S. 30-34, 46 L. Ed. 791-793:

"In this case we are bound to give the same meaning to the state statute that was given to it by the supreme court of the state, and the question which remains for us to decide is whether, as so construed, the statute violates any provision of the Federal Constitution.

"We think it violates the interstate commerce clause of the Constitution of the United States, and that this Court has in several cases decided the principle which invalidates the statute so far as it affects the business of the complainants. The principle is contained in the cases of *Brown* v. *Maryland*, 12 Wheat, 419, 6 L. ed. 678, and *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347. Subsequently the case of *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Comm. Rep. 45, 7 Sup. Ct. Rep. 592, was decided, which is one of the leading cases upon the subject now in hand, and we think that it is decisive of the case before us. That case was tried upon an agreed statement of facts as follows:

" 'Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of ——, 1884, was engaged in the business of drumming in the taxing district of Shelby county, Tennessee, i. e., soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins, & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force, and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins, & Co.' are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the taxing district of Shelby county, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest.'

"The court held upon these facts that the statute of Tennessee of 1881, enacting that 'all drummers and all persons not having a regular licensed house of business in the taxing district 'of Shelby county,' offering for sale, or selling goods, wares, or merchandise therein

by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25.00 per month, for such privilege,' was void as against Robbins.

"The opinion of the court was delivered by Mr. Justice Bradley, in the course of which he said (p. 494, L. ed. p. 696, Inters. Com. Rep. p. 47, Sup. Ct. Rep. p. 594):

" 'In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, *except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one state to sell his goods in another state, without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell

them. But this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course.

"'In certain branches of business it may adopt it with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and *wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things.'

"And again at p. 496, L. ed. p. 697, Inters. Com. Rep. p. 47, Sup. Ct. Rep. p. 595:

"'But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making nego-

tiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States Marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.'

"Other cases followed the Robbins Case, among them *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118; *Leloup v. *Port of Mobile,* 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380; *Asher* v. *Texas,* 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall* v. *California,* 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co.* v. *Pennsylvania,* 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Crutcher* v. *Kentucky,* 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. These cases exhibit different phases of the same general principle, but all follow that principle as announced in the Robbins Case, and deny the right of the state to tax people representing the owners of property outside of the state, for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the state. We think they cover the facts of the case at bar, and render the statute as construed by the state court invalid so far as it affects the business of the complainants described in the agreed statement of facts above set forth."

This Court further said, 185 U. S. 35-36, 46 L. Ed. 794:

"We attach no importance to the fact that in the Robbins Case the individual *taxed resided outside of the state. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the state affect the question. If while so acting and soliciting orders within the state for the sale of property for one nonresident of the state, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm, or corporation, all being nonresidents of the state of Tennessee. The fact that the state or the court may call the business of an individual, when employed by more than one person outside of the state, to sell their merchandise upon commission, a 'brokerage business,' gives no authority to the state to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce. As was said by Mr. Justice Bradley, in the Robbins Case, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592: 'The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce?' It is still a carrying on of interstate commerce, whether the party is acting for one or more principals residing outside of the state and selling their goods through his procurement, acting for them as their agent."

It is also said, 185 U. S. 37, 46 L. ed. 794:

'Although it is said in the opinion of the state court herein that the thing taxed is the occupation of mer-

chandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the state selling the goods of his principal who is a nonresident of the state, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax upon the occupation of the individual residing within the state while acting as the agent of a nonresident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.

* * * * * * *

"Although the state has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the state."

The same result was reached in *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325, 69 L. Ed. 982, 45 Sup. Ct. 525 (1925) in which this Court held that a State statute requiring persons going from place to place soliciting orders for goods and receiving payment or any deposit of money in advance, to secure a license and give bond conditioned for final delivery of the goods ordered, violates the Commerce Clause of the Federal Constitution in so far as it was made to apply to agents soliciting orders in a State to be forwarded to a manufacturer in another State to be filled by C. O. D. shipments and that it was immaterial that the solicitors traveled at their own expense and received their compensation through retention of advance partial payments on goods ordered.

The decision of this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, 60 Sup. Ct. 388, 393 (1940), neither overruled nor discredited the above cited decisions of this Court. On the contrary, Mr. Justice, now

Mr. Chief Justice Stone, in the majority opinion said, 309 U. S. 33, 47, 60 Sup. Ct. 393:

> "Certain types of tax may, if permitted at all so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminated against the commerce *or impose a levy for the privilege of doing it*, or tax interstate transportation or communication or their gross earnings or levy an exaction on merchandise in the course of its interstate journey. * * *" (Italics supplied.)

See also the discussion of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694 (1887), in the majority opinion in *McGoldrick* v. *Berwind White Coal Mining Co.*, 309 U. S. 55-57, 60 Sup. Ct. 397-398. Nothing is there said about overruling that case or the other cases we have cited. On the contrary the authority of these cases is recognized when the issue presented as here involves a license tax imposed by a State or municipality for the privilege of engaging in interstate commerce.

See also:

Davis v. *Virginia*, 236 U. S. 697, 35 Sup. Ct. 497, 59 L. Ed. 795 (1915), opinion by Mr. Justice Holmes;

Stewart v. *Michigan*, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. Ed. 786 (1914);

Crenshaw v. *Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565 (1913);

Rogers v. *Arkansas*, 227 U. S. 401, 33 Sup. Ct. 298, 57 L. Ed. 569 (1913);

Caldwell v. *North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336 (1903).

In addition to the foregoing cases, Mr. Chief Justice Stone in note 11 to the majority opinion in *McGoldrick* v.

Berwind-White Coal Mining Co., 309 U. S. 33, 56, 60 Sup. Ct. 388, 397, cites as in accord with the rule laid down in *Stockard* v. *Morgan, supra,* the following cases:

Corson v. *Maryland,* 120 U. S. 502, 7 Sup. Ct. 665, 30 L. Ed. 699 (1887);

Asher v. *Texas,* 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368 (1888);

Stoutenberg v. *Hennick,* 129 U. S. 144, 9 Sup. Ct. 256, 32 L. Ed. 637 (1889);

Brennan v. *Titusville,* 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719 (1894);

DiSanto v. *Pennsylvania,* 273 U. S. 34, 39, 47 Sup. Ct. 267, 269, 71 L. Ed. 524 (1927);

Caldwell v. *North Carolina,* 187 U. S. 622, 632, 23 Sup. Ct. 229, 233, 47 L. Ed. 336 (1903).

Referring to the cases cited in note 11, Mr. Chief Justice Stone, speaking for the Court, said, 309 U. S. 56-57, 60 Sup. Ct. 397-398 (1940):

> "In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 625, 54 S. Ct. 542, 545, 78 L. Ed. 1025, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co.* v. *Montana,* 233 U. S. 331, 34 S. Ct. 596, 58 L. Ed. 985; *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, with *Schollenberger* v. *Pennsylvania,* 171 U. S. 1, 18 S. Ct. 757, 43

L. Ed. 49; *Robbins* v. *Shelby County Taxing District, supra; Sprout* v. *South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45. It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing District, supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. Compare *Robbins* v. *Shelby County Taxing District, supra*, with *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, 12 S. Ct. 810, 36 L. Ed. 601, see *Howe Machine Co.* v. *Gage, supra; Wagner* v. *Covington, supra;* and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case."

In note 11 to the majority opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., supra*, after referring to *Robbins* v. *Shelby County Taxing District, supra*, and the other cases above referred to, Mr. Chief Justice Stone, speaking for the Court, said, 309 U. S. 56, 60 Sup. Ct. 397:

"* * * Read in their proper historical setting these cases may be said to support the view that this kind of a tax is likely to be used as 'an instrument of discrimination against interstate or foreign commerce,' * * *".

Section 296 of the Virginia Tax Code, Appendix to the Virginia Code of 1936 (Michie), provides as follows:

"City and town licenses.—In addition to the State tax on any license, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same, and require a license to be obtained therefor; and in any case in which they see fit, require from the person licensed, bond, with sureties, in such penalty and with such condition as they may deem proper, or make other regulations concerning the same.

"No city or town shall impose upon or collect from any person any tax, fine or other penalty for selling farm or domestic products within the limits of any such town or city outside of the regular market houses and sheds of such city or town; provided, such products are grown or produced by such person.

"No city or town shall require a license to be obtained for the privilege or right of printing or publishing any newspaper. (Code 1919, secs. 3072, 3062.)"

There are twenty-four (24) cities in Virginia, *Report of the Secretary of the Commonwealth of Virginia, 1939-1940*, pages 269-284. There are one hundred and ninety-one (191) incorporated towns in Virginia, *Report of the Secretary of the Commonwealth of Virginia, 1939-1940*, pages 285-325. It, therefore, clearly follows that one engaged in the soliciting of orders for goods in interstate commerce in the Commonwealth of Virginia could, in addition to being taxed for the privilege of engaging in interstate commerce, be subjected to two hundred and fifteen (215) additional taxes for the same privilege if he undertook to carry on his business in all parts of the Commonwealth as he clearly has a right to do. If the Commonwealth of Virginia and the City of Richmond may lawfully impose license taxes upon petitioner for the privilege of engaging in interstate commerce in the Commonwealth of Virginia and in the City of Richmond, then under Section 296 of the Virginia Tax Code quoted above every other city and town in the Commonwealth of Virginia in which petitioner solicits orders for its principals may tax petitioner for the privilege of soliciting such orders even though the solicitation of such orders is exclusively interstate commerce.

As was well said by the Supreme Court of Appeals of Virginia in *Fugate* v. *Weston*, 156 Va. 107, 110 (1931):

"When we come to weigh a statute, the question is not what has actually been done under it, but what

might have been done. *Violett* v. *Alexandria,* 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825."

It is clearly apparent "that this kind of a tax is likely to be used as 'an instrument of discrimination against interstate or foreign commerce.' "

In *Lyng* v. *Michigan,* 135 U. S. 161, 10 Sup. Ct. 725, 34 L. ed. 150 (1890) this Court said:

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, *or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs to Congress.*" (Italics supplied.)

In *Cooney* v. *Mountain States Telephone & Telegraph Co.,* 294 U. S. 384, 55 S. Ct. 477 (1935), this Court held that where a tax is exacted from one doing both interstate and intrastate business it must appear that the taxes were imposed solely on account of the intrastate business, and that the amount exacted is not increased because of the interstate business done. In so holding, this Court said (55 Sup. Ct. 481-482):

> "There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Port of Mobile,* 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311. There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations.'

Id., page 647 of 127 U. S., 8 S. Ct. 1380, 1383. See *Williams* v. *Talladega*, 226, U. S. 404, 419, 33 S. Ct. 116, 57 L. Ed. 275. Where the tax is exacted from one doing both an interstate and intrastate business it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout* v. *South Bend, Ind.*, 277 U. S. 163, 171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 51 S. Ct. 499, 75 L. Ed. 1171."

In the case of *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 59 S. Ct. 325, 327 (1939), a case that involved a Washington Statute imposing a tax of one-half of 1% on the gross income of the business of any person engaged in business activities in Washington, this Court, speaking through Mr. Justice, now Mr. Chief Justice Stone, the author of the majority opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* said:

"For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, 6 L. Ed. 678, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344, 26 L. Ed. 565; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Robbins* v. *Shelby County Taxing District, supra; Leloup* v. *Mobile*, 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311; *Brennan* v. *Titusville*, 153 U. S. 289, 14 S. Ct. 829, 38 L. Ed. 719; *International Text-Book Co.* v. *Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A., N. S., 493, 18 Ann. Cas. 1103; *Fisher's Blend Station* v. *State Tax Commission, supra; Adams Manufacturing Co.* v. *Storen, supra.* For half a century, following the decision in *Philadelphia & S. M. Steam-*

ship Co. v. *Pennsylvania*, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. * * *"

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 69 L. Ed. 916, 44 A. L. R. 1219 (1925), this Court said, in discussing the subject of taxes based upon interstate transactions:

"The amount demanded is unimportant when there is no legitimate basis for the tax. * * *"

The issue here presented does seem to warrant the observation that once the rule of law so long adhered to is relaxed there surely will follow consequences of far reaching importance to the future well being and general prosperity of the Nation as a whole. Interstate commerce has been and must continue to be the very life blood of the Nation. To retard, hamper and destroy the normal and natural flow of interstate commerce must of necessity affect the matter of national interest and security. It then follows that if the matter be vital to this Nation, made up as it is of a number of States and subordinate county and municipal governments that we guard with jealous care the lanes of communication over which and through which the stream of interstate commerce must flow. In this way only can the right of one individual to trade with another in a distant part of the Nation be made secure. To place a direct tax

on one engaged in interstate commerce is to place a burden on interstate commerce, and once the right to do so is established by a decision of this Court or otherwise the right will be claimed and asserted by each of the forty-eight States and numerous county and municipal governments. Trade barriers of every kind and nature will in due time be set up and established. This result will be inevitable by reason of the diversity of conditions and interests which exist and will always exist in the several States of the Union. The need for, and the necessity of, these States for additional revenue will no doubt be proclaimed as the reason back of the enactment of tax laws, but ingenious and discerning minds will see in such a policy the opportunity of breaking down normal and orderly competition by establishing through the medium of tax laws, trade barriers beneficial to their particular business. The revenue producing power of such laws will in many instances become of secondary importance and consideration. The right of the individual to purchase and to trade in the open market of the Nation will be circumscribed and hedged about by the laws of the respective States.

We are not here concerned with the amount of the tax imposed but we are vitally concerned in the maintenance of a wise and well-established rule of constitutional law, established and adhered to by this Court down through the years. The question here at issue is of vital importance to the individual citizen wheresoever he may live in this Union. It is likewise of vital and far reaching importance to the Nation as a whole. Wise, indeed, is that provision of the Constitution which vests in the Congress the power to regulate interstate commerce. The Congress being a national legislative body acts or should act at all times in the interest of the Nation as a whole. This has never been true of the forty-eight State legislatures which legislative bodies by necessity must act separately and in a manner

best suited to the advancement of the interest of the respective States. The imposition of a tax on interstate commerce is but an indirect method of regulating such commerce. State and municipal tax laws however lenient they may be, will nevertheless operate as a burden upon and a regulation of interstate commerce. Such power if and when exercised will ultimately lead to confusion and will retard, hamper and throttle the normal flow of interstate commerce into the various States of the Union.

This Court has heretofore recognized the fact that it was "the mutual jealousies and agressions of the States taking form in customs barriers and other economic retaliation" which was the chief occasion of the Commerce Clause of the Constitution of the United States. *Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55, 60 (1935).

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944, 949 (1938) this Court in the majority opinion, speaking through Mr. Justice, now Mr. Chief Justice Stone, recognized the fact that "the multiplication of State taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. * * *" This statement is equally true of a license tax imposed by a State or municipality for the privilege of carrying on interstate commerce. It is, as this Court has repeatedly held, a tax and a burden upon interstate commerce that is prohibited by the Commerce Clause of the Constitution of the United States. If States and municipalities are now to be authorized to impose fixed-sum license taxes for the privilege of carrying on interstate commerce the doom of interstate commerce has commenced.

It cannot be believed that this great Court, familiar with the history of the causes that brought about the adoption of the Commerce Clause of the Constitution, will tear up and destroy that interpretation of the Commerce Clause under which interstate commerce has flourished and the Nation thrived in order to permit the States and their municipal governments to throttle and destroy such commerce. Already the Commonwealth of Virginia requires of petitioner a franchise tax on its capital, an income tax on its net income, automobile license taxes on the motor vehicles used in its business, gasoline taxes on the fuel consumed in such vehicles, taxes on its bank deposits, and probably other taxes, all of which are recognized as legitimate burdens upon, and which add to petitioner's expense in carrying on interstate commerce; but there is no occasion in justice for the imposition on petitioner of additional taxes in the guise of licenses imposed solely for the privilege of carrying on interstate commerce, the multiplication of which by the municipalities of Virginia will inevitably 'spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the Commerce Clause to remove. * * *"

It is, therefore, respectfully submitted that petitioner is entitled to a writ of certiorari and that the judgment of the Supreme Court of Appeals of Virginia complained of should be reversed and annulled.

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